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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1928 29

No. 8106 62

JOHN BAIZLEY IRON WORKS AND THE OCEAN ACCIDENT AND GUARANTEE CORPORATION, LIMITED, APPELLANTS,

vs.

ABRAHAM SPAN

APPEAL FROM THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

FILED APRIL 4, 1929

(34,119)

(34,119)

SUPREME COURT OF THE UNITED STATES

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IN SUPREME COURT OF PENNSYLVANIA

JOHN BAIZLEY IRON WORKS and THE OCEAN ACCIDENT AND GUARANTEE CORPORATION, LIMITED, Appellants,

vs.

ABRAHAM SPAN

ORDER ALLOWING APPEAL—Filed March 6, 1929

The appellants in the above-entitled suit, and each of them, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above-entitled suit by the Supreme Court of the State of Pennsylvania, on the 7th day of January 1929, and from each and every part thereof, and having presented and filed their petition for appeal, assignment of errors, and prayer for reversal, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided;

It is now here ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the Supreme Court of the State of Pennsylvania in the above-entitled case, as provided by law, and it is further ordered that the Prothonotary of the Supreme Court of the State of Pennsylvania shall prepare a certified transcript of the record, proceedings and judgment in this [fol. 2] cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within thirty days of this date.

And it is further ordered that security for costs on appeal and to act as a supersedeas be filed in the sum of five hundred dollars.

Dated March 6th, 1929.

R. von Moschzisker, Chief Justice of the Supreme Court of Pennsylvania.

[File endorsement omitted.]

[fols. 3-5] Citation, in usual form, showing service on Samuel Moyerman, filed Mar. 7, 1929, omitted in printing.

[fol. 6] BEFORE WORKMEN'S COMPENSATION BOARD

Claim Petition No. 25210

ABRAHAM SPAN, Claimant,

v.

JOHN BAIZLEY IRON WORKS, Defendant

PETITION

To the Workmen's Compensation Board of Pennsylvania:

The claimant respectfully alleges the following facts:

1. By whom were you employed at the time of the accident? John Baizley Iron Works, 514 S. Delaware Ave., Phila., Pa.

2. Where did the accident happen? On ship "Baldhill," on Delaware River, Phila., Pa. (Pier 98 South).

3. When did the accident happen? January 13, 1926, about 4 p. m.

4. What kind of work were you doing at the time of the accident? Painting the angle irons on board ship.

5. What was the nature of the injury and how was it caused? Both eyes affected by sparks. One of the workmen for the John Baizley Iron Works was cutting iron with an acetylene torch flew down to where I was some distance away from the torch, and got into my eyes, making them so sore that I was unable to do any work the next day, [fol. 7] and they have continually gotten worse.

6. Did you receive medical, surgical, or hospital services? Yes, medical services the Ocean Accident & Guar. Corp., Ltd., 416 Walnut St., sent me to see Dr. Clarence P. Franklin, U. S. Veterans Bureau, Kann Bldg., 20th and Arch Sts., and I afterwards went to see Dr. J. J. Simpkins, N. E. Cor. 18th and Chestnut Sts., Phila., Pa.

7. Did you request the defendant to furnish these services? Yes. Were they furnished? Only by first physician. If not, what sums did you spend for them? $24 already.

8. To what extent did your injury prevent you from working? Absolutely altogether. For how long? I am still prevented, and I cannot see any possibility of going back to work. Have you fully recovered? No. Have you partially recovered, and if so to what extent? Eyes seem to be getting worse. When did you resume work? Have not been able to resume work of any kind.

9. What were your weekly wages at time of accident? $30 and if overtime $35.

What was the business of your employer? Iron works. What was your occupation? Blacksmith helper.

10. When did you serve notice of your injury upon your employer? The next day to the employer, who referred him to the Ins. Co. and he had a number of interviews with [fol. 8] the Insurance Co. before seeing counsel.

11. What other facts are there which you believe important? ——.

12. State total amount of compensation claimed? Full compensation until injury is relieved.

Wherefore the claimant asks that your Honorable Board shall make an award that the defendant shall pay to him such compensation as may be due him under the above alleged facts.

Abraham (his x mark) Span, Claimant, 513 Reed St., Phila., Pa.

Witness: James A. Lynd.

Subscribed and sworn to before me this 2 day of March, 1926, at Phila., Pa. James A. Lynd. My commission expires on the 7th day of January, 1927. (Seal.)

[fol. 9] BEFORE WORKMEN'S COMPENSATION BOARD

ABRAHAM SPAN, 513 Reed Street, Philadelphia, Pennsylvania, being duly sworn according to law, testified as follows:

Direct examination.

By Mr. Weaver:

Q. Who did you work for prior to January 13th?
A. John Baizley Iron Works.
Q. How long had you worked for them?
A. All winter and this winter I worked not all winter but three or four days a week.
Q. Were you working for them on January 13th?
A. Yes.
Q. Where?
A. Down at Bald Hill.
Q. Were there a lot of other people there working with you?
A. Yes.
Q. What particular work were you doing on that day?
A. I was painting the iron in the engine room.
Q. Tell the Referee what happened to you on January 13th?
A. We came in the morning to work.
Q. Just before this accident occurred to you what were you doing?
A. We worked in the boiler shop.
Q. On this particular day you were working on this ship?
A. Yes.
Q. There were a lot of other people with you?
A. Yes.
Q. What were they doing?
A. I was painting the iron and the other people were fixing the floor.
[fol. 10] Q. What was the man doing that had the acetylene torch?
A. I was painting the iron and the burner come over by the name of Harry.
Q. Who was he employed by?
A. John Baizley Iron works.

Q. What happened?

A. I called him over to burn up the iron I was from him like to this where I was painting and I called him over to burn the iron on the other side, as soon as he put the torch to the iron why the flame caught me in the eye, that was about ten minutes of five, the foreman had gone up to get ready to go home, I didn't know what to do, I went up on the deck, I said to the fellow from the machine shop, "where is Harry," he said he just went off the ship, I called him back and I said, "Harry, I got a terrible accident, I will not be here tomorrow," he said, "what is the matter with you," I said, "you see me don't you," and a boy run to the Doctor right away, that was quitting time and the office was closed and I went home, all the time the eyes were getting red and swelled up, my wife said, what is the matter with your eyes, I started to get pain and I went to the drug store and he gave me some washing stuff but it did not help me, he said you better go to the hospital.

Q. Is that the card they gave you on the day that you went to the hospital (handing claimant a card)?

[fol. 11] A. Yes, they told me that they could not give me treatment but they will give me a couple of drops, but they don't handle compensation cases, they told me to go back to the people that I worked for and I went to John Baizley's with the bandage on.

Q. Who did you see at the Iron Works and what did you say to them?

A. I went from the hospital to Baizley's to tell them that I was hurt, I went in a little store near the shop, them people knowed me, I went there to get a pair of gloves, the woman said, "what is the matter with your eyes," I told her and then I told the bookkeeper, he said the only thing we can do is to make out the report and sent it to 416 Walnut and I took the report and gave it to Miss Fisher and she sent me to Doctor Franklin he told me the same thing that they told me at the Wills Eye Hospital, he said I should go the Insurance Company and see what they say, I went to them but the handed me some kind of paper I should sign up, I said, "nothing doing."

Q. Can you read?

A. No.

Q. Can you write?

A. No, they said it was al- right to make a cross.
Q. Did they read the paper to you?
A. No.
Q. Did they offer you money to sign it?
[fol. 12] A. Yes.
Q. How much?
A. They tell me, we will give you $36.00, I said, "you could give me $30,000 and I will not sign it, I said I don't know how my eyes will come out."
Q. That was on the 14th of January?
A. Yes.

By the Referee:

Q. Who did treat you?
A. Doctor Simpkins.
Q. That is your own Doctor?
A. Yes.
Q. How many times did you see Doctor Simpkins?
A. I can't remember axactly, probably two weeks.
Q. How much did you pay him?
A. About $3.00 a visit, for a couple of times I did not pay him nothing.

By Mr. Weaver:

Q. You went to the Company doctor until they stopped you?
A. Yes.
Q Then you had to go to Doctor Simpkins?
A. Yes.

By Mr. Weaver: I have receipts from Doctor Simpkins for March 8th, 10th, 16th, 18th and 20th all for $3.00 per visit.

[fol. 13] Q. Were you able to continue the service of Doctor Franklin continuously?
A. No, I did not take anything, they said they wanted me to go to him again and I did.
Q. When was this, was it after you saw Doctor Simpkins?
A. I went to Doctor Simpkins after they said they wanted me to go to Doctor Franklin again.

Q. Did someone come out to your house and tell you to go to Doctor Franklin?

A. Yes.

Q. Have you been able to do any work since this accident?

A. No.

Q. What is the condition of your eyes, do you try to see, do you try to get around?

A. I have to go with my wife.

Q. She leads you?

A. Yes.

Q. What was your salary?

A. $35.00 per week.

Q. Have you been able to earn anything since the 13th of January?

A. No.

Q. Do you feel that you could do anything at all?

A. Maybe I could sell something whereby I could make a living.

Q. If you could get some business in the house?

A. Yes.

[fol. 14] Cross-examination.

By Mr. Dixie:

Q. Where were you working at the time of your injury?

A. John Baizley Iron Works.

Q. Where?

A. On a ship.

Q. On board a ship?

A. Yes.

Q. Below the deck?

A. In the engine room.

By Mr. Dixie: "Mr. Referee, I question the authority of this Court on this case, coming under the Maritime Act, he was working on ship board and the ship was commissioned in Commerce, being repaired."

By Mr. Weaver: "This boat was tied up against the bank in the Delaware River."

By the Referee: "What was the ship doing here?"

By Mr. Dixie. "She was being repaired at Pier 98 South Wharves."

[fol. 15] BEFORE WORKMEN'S COMPENSATION BOARD

OPINION OF THE REFEREE

(a) Findings of Fact

From the testimony taken in this case and the undenied statements in the claim petition, your Referee finds the following facts:

1. That on January 13, 1926, Abraham Span, the claimant, was in the employ of the John Baizley Iron Works, the defendant, as a blacksmith's helper.

2. That on January 13, 1926, neither the claimant nor the defendant had filed with the Workmen's Compensation Bureau, nor served upon the other, notice of their rejection of Article III of the Workmen's Compensation Act of 1915 and the amendments thereto.

3. That on January 13, 1926, and for some time previous thereto the claimant received an average weekly wage of $30.00.

4. That on January 13, 1926, while in the course of his employment with the defendant on the ship Bald Hill, when painting angle irons, some sparks from an acetylene torch that was being used by a fellow employe entered both eyes [fol. 16] of the claimant, burning the cornea, of which the defendant had due notice; that prior to January 13, 1926, the Bald Hill steamed to Philadelphia to have certain necessary repairs made and was tied up to Pier 98 South in the Delaware River; that on January 13, 1926, the Bald Hill was out of commerce and was laid up for repairs; that the claimant was examined by Dr. Charles P. Franklin for the defendant and on January 14, 1926, he was treated at the Wills Eye Hospital; that on January 19, 1926, after the defendant had refused treatment, the claimant went under the care of Dr. J. J. Simpkins; that upon examination by Dr. Simpkins it was found that there was an ulcer in the cornea of the right eye resulting in a nebula over the cornea of this eye; that there was also a marked bulbar conjunctivitis in both eyes, but the vision was such on March 18, 1926, that he was able to return to work; that the claimant was treated by Dr. Simpkins on thirteen occasions from January 19, 1926, to

February 4, 1926, for which services the Doctor has rendered a bill in the sum of $43.00, no part of which has been paid either by the claimant or the defendant; that the treatments given by Dr. Simpkins subsequent to February 4, 1926, have been paid by the claimant; that as a result of the accident, the claimant was disabled from January 13, 1926, [fol. 17] to March 18, 1926, at which time he was able to return to work.

5. That on January 13, 1926, the Ocean Accident & Guarantee Corporation, Ltd., was the compensation insurance carrier of the defendant and they have agreed to pay for the defendant to the claimant any compensation that may be found to be due arising out of these proceedings.

(b) Conclusions of Law

1. That both parties were bound by the provisions of Article III of the Workmen's Compensation Act of 1915 and the amendments thereto.

2. That the claimant, having met with an accidental injury such as contemplated by the Workmen's Compensation Act of 1915 and the amendments thereto while in the course of his employment with the defendant, is entitled to compensation.

(c) Award

Compensation is awarded, and the Ocean Accident & Guarantee Corporation, Ltd., insurer of defendant, is directed to pay to Abraham Span, claimant, sixty per cent (60%) of the maximum weekly wage of twenty dollars ($20.00) or twelve dollars ($12.00) per week, from January [fol. 18] 23, 1926, to March 18, 1926, a period of seven (7) weeks and five (5) days, or the sum of ninety-four dollars ($94.00).

To Dr. J. J. Simpkins, the sum of forty-three dollars ($43.00) for the propert and reasonable medical services rendered the claimant during the first thirty days following disability, making a total award of one hundred thirty-seven dollars ($137.00).

C. W. Bosler, Referee, First District.

E.

Phila., Penna., June 2, 1926.

2—810

[fol. 19] BEFORE WORKMEN'S COMPENSATION BOARD

[Title omitted]

OPINION

MORRISON, Commissioner:

The facts in this case are simple. Abraham Span, an employe of the John Baizley Iron Works, was injured while painting angle irons on board the ship Bald Hill, tied to a pier, in the Delaware River, for repairs.

Webster's International Dictionary has this definition:

"Admiralty jurisprudence has cognizance of maritime contracts and torts, collisions at sea, cases of prize in war, etc., and, in America, admiralty jurisdiction is extended to such matters arising out of the navigation of any of the public waters."

Benedict's Admiralty defines mariners as persons employed on board ships and vessels, during voyage, to assist in their navigation and preservation, or to promote the purpose of the voyage.

Hughes on Admiralty, Section 6, says:

"Every one who is regularly attached to the ship, and contributes to her successful handling, is a seaman."

[fol. 20] Section 3, Act of March 3, 1878, Chapter 156, 18 Stat. L., 485, declares:

"The term 'seaman' wherever employed in legislation relating to the marine hospital service, shall be held to include any person employed on board in the care, preservation or navigation of any vessel, or in the service, on board, of those engaged in such care, preservation or navigation."

The word "seaman" is defined in 35 Cyc. 1178 to be "one whose occupation is to assist in the management of ships at sea; a mariner; a sailor." This authority, after enumerating typical inclusive occupations, excludes lightermen, masters, servants of masters, musicians, physicians, draughtsmen and performers in a show on board a vessel. While in Federal case No. 14,136, it was held that one who

tendered services contributing to the preservation of the vessel, was a seaman, the trend of the decisions is to confine maritime law to seamen and sailors and persons regularly engaged in navigation in the usual and common sense interpretation of that term.

Analagous to the case at bar is the ruling in Bradley v. Bolles, Abbot, Adm. 569, Parsons on Admiralty, wherein it was held that a workman hired to scrape the bottom of a vessel, preparatory to her being coppered, cannot sue in [fol. 21] admiralty.

Directly ruling the case at bar is the decision of the U. S. Supreme Court in Grant Smith-Porter Ship Company v. Herman F. Rhode (66 L. ed. U. S. Supreme Court, page 172). Rhode was employed as a carpenter by the defendant, a shipbuilding company, and was injured while working on a partially completed vessel after it had been launched in navigable waters in the State of Oregon. The Circuit Court of Appeals certified the following questions to the United States Supreme Court:

(1) "Is there jurisdiction in admiralty because the alleged tort occurred on navigable waters?"

(2) "Is libellant entitled because of his injury to proceed in admiralty against respondent for the damages suffered?"

The Supreme Court held that while (1) "the general admiralty jurisdiction extends to a proceeding to recover damages resulting from a tort committed on a vessel in process of construction when lying on navigable waters within a state," nevertheless (2) "in the circumstances stated, the exclusive features of the Oregon Workmen's Compensation Act would apply and abrogate the right to recover damages in an admiralty court which otherwise would exist."

The Court held that the employment (that of carpenter) is essentially non-maritime in character which is important [fol. 22] in its bearing on this case and similar cases arising in the administration of the workmen's compensation law. The Oregon compensation act is of the elective class, such as Pennsylvania's where the parties are presumed to have accepted it in the absence of expressed rejection. In

the Rhode case as here, neither party had made such rejection. The Oregon act also provides for contribution by both parties to a fund out of which compensation was to be paid and both parties had contributed to this fund but, in the main, the case is on all fours with the case at bar.

The Supreme Court expressly stated its conclusion was in harmony with the Jensen case, 244 U. S. 205, for, "in each of them the employment or contract was maritime in nature and the rights and liabilities of the parties were prescribed by general rules of maritime law essential to its proper harmony and uniformity. Here the parties contracted with reference to the State statute; their rights and liabilities had no direct relation to navigation, and the application of the local law cannot materially affect any rules of the sea, whose uniformity is essential."

The case of Raine v. Jobson, 3 W. C. C., 135, is expressive of the courts of Great Britain, where admiralty jurisprudence is of immense importance. Here it was held that, so [fol. 23] far as concerns a man working on a ship, if the ship is in a dock, the dock being a factory, the ship is in a factory, and therefore a man working on the ship is working in a factory. This was declared as ruling in the case of Bartell v. Gray & Company, 85 L. T. 658, the circumstances of the latter being identical with the case at bar; to-wit, a workman injured while painting a ship lying at a wharf for repairs. The claimant was declared within the provisions of the workmen's compensation law.

The appeal is dismissed and the findings of fact, conclusions of law and award are hereby sustained.

John L. Morrison, Commissioner.

Concurred in by Chairman Houck and Commissioner Fleitz April 2, 1927.

[fol. 24] IN COURT OF COMMON PLEAS, No. 4, MARCH TERM, 1927

No. 10143

ABRAHAM SPAN

vs.

JOHN BAIZLEY IRON WORKS

OPINION

FINLETTER, J.:

The claimant was employed by the John Baizley Iron Works. While painting angle irons on the ship Bald Hill, sparks from an acetylene torch, that was being used by a fellow employe, entered both eyes, and, burning the cornea, destroyed the sight.

The ship was brought to the defendant's works, and tied up to a pier in the Delaware River, to permit the making of certain repairs.

The Referee found that the ship was "out of commerce" and awarded compensation. The Workmen's Compensation Board confirmed the award.

Exceptions were taken on behalf of the defendant, on the ground that the Compensation Board is without jurisdiction, because the vessel was engaged in commerce, and therefore subject to admiralty jurisdiction (exclusively).

The mere fact that the instrumentality in question may be put to maritime use, does not oust the jurisdiction of [fol. 25] the state. It is the character of the work in which employer and employe are engaged that is the criterion.

The distinction, which rules this case, is drawn by the Chief Justice in Linway v. Pennsylvania Company, 268 Pa. 491, where he says, at page 495:

"The United States Supreme Court's decisions seem to distinguish between accidents happening to one while working on, or with, things which are in actual common use as instrumentalities of both interstate and intrastate commerce (see Waina v. Pennsylvania Company, 251 Pa. 213; Pedersen v. D. L. & W. R. Co., 229 U. S. 146), and those occurring to persons while employed or working on

things then being put in position for such common use in the future (see Harrington Case, 241 U. S. 177; Raymond v. C. & C. R. R., 243 U. S. 43; N. Y. C. R. R. v. White, 243 U. S. 188). As already indicated, we think the latter class of authorities must be accepted as our guide in the present instance."

We gather from this that the test is, was the work done in the actual use in commerce of the instrumentality or was it in making the tool? Applied to the case at bar was the claimant employed in sailing the ship or in building it, or rebuilding it, or in making substantial repairs, not mere incidents to the voyage?

[fol. 26] In the case above cited the claimant was engaged in filling oil tanks, from which trains, in use in both classes of commerce, where to draw their supply. In the Harrington case the employe was at work filling coal bins for similar joint use. In the Pedersen case the claimant was engaged in the maintenance of tracks actually in use in interstate commerce. In the Raymond and White cases the employe was engaged in new construction. In the first case the claimant was held to be engaged in the commerce for which the line was intended. In the latter two his employment was regarded as local.

A vessel is not under exclusive maritime jurisdiction until she is finished and in commission. (Grant-Smith Co. v. Rohde, 66 L. ed. U. S. S. C., page 172.) Until then she is simply a structure, so much timber and steel, subject to local law, like any other tangible personal property. A contract for building a ship is not a mar-time contract. (Peoples Co. v. Beers, 20 How. 393; Roach v. Chapman, 22 How. 129.) And it would seem that she is in the same situation when withdrawn from commerce for reconstruction. (Raine v. Jobson & Co., 85 Law Times, 141; Lord Chancellor Halsbury) where a workman was killed while repairing a ship that had been drydocked for cleaning and repairs. See also Bartell v. Gray & Co., 85 Law Times, [fol. 27] 658, where the work in hand was painting a ship which was lying at a wharf, in a dock, and undergoing repairs. The "dock" in the first case, and the "ship" in the second, were held to be "factories" ("premises" under our Statute) within the meaning of the Compensation Stat-

ute. The Lord Chancellor in the first case "agreed" that the Compensation Statute did not intend "to deal with the relation between ship owners and sailors when engaged in their ordinary occupation of sailing upon the sea, or bring them within the statute at all." * * * "But" (he said) "it seems to me an extraordinary extension of the immunity * * * to suppose that because the accident happened in or upon a ship therefore it is to be excluded from the operation of the Act of Parliament generally."

We cannot guess that the repairs in process in the case before us were simply those incidental to a voyage, or were merely the necessary upkeep of vessel while in commercial use. For all the evidence discloses she may never have been upon a voyage at all, she may never have been completed. Or, on the other hand, she may have been after long service taken out of commission and brought to the defendant's workshop for reconstruction. In other words, there is nothing to show that the vessel was in actual use in maritime commerce. Indeed there is no testimony that the ship had ever been so engaged, except the idea that may be [fol. 28] conveyed by the fact that she was a ship, and the statement that she was undergoing repairs. No evidence was offered by the defendant that throws any light upon this subject, and the plaintiff's proofs show simply that the vessel was being "repaired."

"Brought in for repairs" is a very indefinite phrase in its bearing upon the case. It would include everything from the casual repairs made during a voyage by the ship's carpenter, which would be but an incident to the voyage, and governed by maritime law, to a taking of the ship out of commerce for general overhauling, amounting to a rebuilding, as to which the parties would be governed by the same rules as those applying to the original building. And, between those extremes, might be a limited amount of adjustment of the ship to receive a particular cargo, as in the case of Doey v. Howland Co., 224 N. Y., 30.

The work was being done in Pennsylvania, and should be governed by the laws of this State, until something is shown to bring it within another jurisdiction. The burden is on the defendant, which asserts that the vessel was engaged in commerce, to prove it. There is no inference to

be drawn from the mere fact that the structure in question is a ship (Raine v. Jobson & Co., Supra). In this state of the evidence the finding of the Referee, which is binding [fol. 29] upon us, that the ship was not "in commerce" is in complete accordance with the proofs. He could not have found otherwise.

The cases (Southern Pacific Co. v. Jensen, 244 U. S. 205; and S. I. C. v. Nordenhalt, 259 U. S. 263) of stevedores engaged in the unloading of vessels are not significant. The unloading of a cargo is obviously as much a part of the voyage, as the loading and the journey itself.

In Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, cited by the defendant, the employe was a "bargeman doing work of a maritime nature." This case throws no light upon the subject under discussion.

For these reasons we are of opinion that the appeal should be dismissed.

[fol. 30] In Superior Court of Pennsylvania, October Term, 1927

No. 388

Abraham Span

v.

Accident and Guarantee Corporation, Insurance Carrier, Appellant

Appeal from Final Judgment of Court of Common Pleas No. 4 of Philadelphia County, as of March Term, 1927, No. 10143, Affirming Award of Workmen's Compensation Board

Opinion—Filed March 2, 1928

Linn, J.:

This controver-y is between an insurance company and a workman to whom the insurer stood as employer pursuant to the workmen's compensation act and supplements. The workman, Span, was employed as a blacksmith's helper by Baizley Iron Works, engaged in repairing the steamship

Bald Hill berthed alongside Pier 98 South, Delaware River, Philadelphia. While painting angle irons in the ship, sparks from the torch of another workman flew into Span's eyes and injured them. He claimed under the Workmen's Compensation Act 1915 P. L. 736 and received an award; it was affirmed by the compensation board and by the common pleas, which entered judgment against the employer's insurance carried. It appeals and presents a single contention,—that the court lacked jurisdiction of the subject—that the judgment is in conflict with the federal rule requiring uniformity in the admiralty and maritime law. [fol. 31] We pass what is said in the briefs concerning the finding of the referee that the ship was "out of commerce." While a contract to construct a new ship is not maritime (Thames Co. v. Francis McDonald, 254 U. S. 242) and repairing an existing ship is (New Bedford v. Purdy, 258 U. S. 96), we shall consider this as a case of mending, not making a ship, and therefore maritime in character: Robins Dry Dock v. Dahl, 266 U. S. 449).

The compensation law creates a system of elective compensation, article 3, sections 301, etc., 1915 P. L. 738. The related act of June 2, 1915 P. L. 769, sec. 1, requires that the insurance carrier agree to be responsible directly to the employe for payment of compensation, and the supplement of June 26, 1919, P. L. 642, section 401, article IV, P. L. 659, defines employer as including the insurer. The insurer may be made a party to the suit: Levan v. Rwy. Co. 279 Pa. 381. The judgment in this case against the insurer is in accord with the statute. No judgment was entered against the employer whose name in the title to this appeal is surplusage.

It is now definitely settled that for some maritime torts, state compensation laws may be enforced without encroaching on the admiralty; the test is—will such enforcement "materially affect any rules of the sea whose uniformity is essential?"[1] It has been held that the exercise of the

[1] For general discussion of the subject,—see The Common Law and The Law of the Sea, 36 Har. Law Rev. 777; Admiralty Jurisdiction of Late Years 37 Ib. 529; Effect of Federal Admiralty Jurisdiction on Workmen's Compensation Acts 35 Ib. 743, Compensation for Stevedores 37 Ib. 478; Uniformity in the Maritime Law 37 Ib. 1114; A Memorandum Decision 40 Ib. 485; Edgar F. Fell; Recent Problems in Admiralty Jurisdiction.

right to elect that employment shall be subject to a state compensation statute, and the consequent enforcement of the election, do not interfere materially with the uniformity of the admiralty: Miller's Underwriters v. Braud, 270 U. S. 59. In that case, it appeared that a diver died from failure of air supply while submerged and employed in sawing off timbers of an abandoned set of ways that obstructed navigation. The decision was that though the [fol. 32] general admiralty jurisdiction would extend to such maritime tort, the parties had elected to be governed by the provisions of the state compensation act and not by the maritime law. It was said that the subject was of "mere local concern and its regulation by the state will work no material prejudice to any characteristic feature of the general maritime law. The act prescribes the only remedy; its exclusive features abrogate the right to resort to the admiralty court which otherwise would exist," 270 U. S. p. 64, 65. In State Industrial Board of State of New York vs. Terry & Tench Co., Inc., et al., 273 U. S. 639, a judgment of the state court (240 N. Y. 292) refusing relief under the state compensation act was reversed without discussion, on the authority of Miller's Underwriters v. Braud. The claimant in that case sustained maritime injury, having been injured while standing on a floating raft in navigable waters, and the state statute enforced was compulsory. It would seem clear that if the parties may choose compensation under the state law or the remedy in admiralty, the waiver of the right in admiralty by choosing compensation results in less interference than if the compensation act were compulsory. "Here," as was said in Grant Smith Porter v. Rhode, 257 U. S. 469, 477, "the parties contracted with reference to the state statute; their rights and liabilities had no direct relation to navigation, and he application of the local law cannot materially affect any rules of the sea whose uniformity is essential." The compensation statute of Alabama was enforced in Rosengrant v. Harvard, 211 Ala. 605, 213 Ala. 202, for a tort committed on navigable waters (though the state court described the tort as non-maritime) and the judgment was affirmed in a memorandum opinion: 273 U. S. 664. See also Southern Realty Co. v. Stubbs (Tex. Civ. App.) 199 S. W. 343, Lumberman's Assoc. v. Adcock (Texas) 244 S.

W. 645, Southern Surety Co. v. Crawford (Texas) 274 S. W. 280, (certiorari refused, 270 U. S. 655), Southern Casualty v. Lindberg, 18 Fed. (2nd) 453 (certiorari refused 47 Sup. Ct. 769), Bockhap v. Transit Co., N. J. 117 Atl. 624, Toland's case (Mass.) 155 N. E. 602, and Messel v. Foundation Co., 274 U. S. 427.

Judgment affirmed.

Judge Gawthrop dissents.

[fol. 33] [File endorsement omitted]

[fol. 34] In Supreme Court of Pennsylvania, Eastern District, January Term, 1928

No. 259

Abraham Span

vs.

John Baizley Iron Works and The Ocean Accident & Guarantee Co., Insurance Carrier, Appellants

Agreed Statement of Facts—Filed Nov. 27, 1928

It is hereby agreed by and between Charles A. Wolfe, Esq., attorney for appellant and Samuel Moyerman, Esq., attorney for appellee, that the following statement of facts shall be substituted for all of the evidence produced at the hearing before the referee in the above matter and shall be printed in the record on appeal in lieu thereof.

The claimant, Abraham Span, was at the time of the injuries in question, on January 13, 1926, a resident of Philadelphia and employed at Philadelphia by the defendant, John Baizley Iron Works. The defendant was engaged in performing certain repairs to the steamship "Bald Hill," at Philadelphia, including inter alia, the painting of the engine room and repairs to the floor of the engine room, The said vessel had prior thereto steamed to Philadelphia for necessary repairs, and at the time of the alleged accident was tied up to Pier 98 South in the Delaware River. [fol. 35] The claimant, in the course of his aforesaid em-

ployment by the defendant, was painting angle irons in the engine room of the vessel. Sparks from an acetylene torch being used by a fellow employe working near claimant, entered the claimant's eyes and caused the injuries resulting in the alleged disability of the claimant.

Chas. A. Wolfe, Attorney for Appellant. Samuel Moyerman, Attorney for Appellee.

[File endorsement omitted.]

[fol. 36] In Supreme Court of Pennsylvania

[Title omitted]

Opinion and Judgment—Filed January 7, 1929

Moschzisker, C. J.:

Abraham Span claimed under the Pennsylvania workmen's compensation law, Act of June 2, 1915, P. L. 736, as amended by the Act of June 26, 1919, P. L. 642, for an accidental injury which happened to him on January 13, 1926; he obtained an award, which was approved by the compensation board, affirme dby the court of common pleas, and, on appeal, by the Superior Court; the case is before us on appeal by defendants from the judgment of the last mentioned tribunal.

For purposes of the present appeal, the parties have agreed upon a statement of facts under Rule 56 of this court, which provides that they "may substitute an agreed statement of facts for all or any part of the evidence, and print it in lieu thereof." This statement is as follows: "The claimant, Abraham Span, was at the time of the injuries in question, on January 13, 1926, a resident of Philadelphia and employed at Philadelphia by the defendant, John Baizley Iron Works. The defendant was engaged in performing certain repairs to the steamship Bald Hill, at Philadelphia, including, inter alia, the painting of the engine room and repairs to the floor of the engine room. The said vessel had prior thereto steamed to Philadelphia for necessary repairs, and at the time of the alleged acci-

dent was tied up to Pier 98 South in the Delaware River. The claimant, in the course of his aforesaid employment by the defendant, was painting angle irons in the engine room of the vessel. Sparks from an acetylene torch, being used [fol. 37] by a fellow employe working near claimant, entered the claimant's eyes and caused the injuries resulting in the alleged disability of the claimant." It will be noticed that there is nothing here to show that the scope of Span's general employment contemplated maritime work nor that his injury resulted from a tortious act on the part of his employer or any one else.

The above recital of facts covers all the findings of the compensatioon authorities except a statement by the referee that the boat on which Span met his injuries was at the time "out of commerce and laid up for repairs." Appellants have no fault to find with the statement that the boat was laid up for repairs, but say correctly: "The referee's statement that the vessel was out of commerce is in itself inconsistent with the finding that the vessel 'had steamed to Philadelphia to have certain repairs made.'" Under the circumstances here shown, the ship was not, in a legal sense, out of commerce so as to deprive admiralty of its general jurisdiction in the premises: The Robert W. Parsons, 191 U. S. 17; The Steamship Jefferson, 215 U. S. 130, 141-2-3; Clyde Steamship Co. v. Walker, 244 U. S. 255, 256-7; Gonsalves v. Morse, 266 U. S. 171, 172.

The principal question involved is, can this claimant take advantage of our state compensation law, or is his claim cognizable exclusively under the maritime law

In a rather extensive research for the correct answer to the above point, we have particularly studied those opinions of the Supreme Court of the United States, from Southern Pacific Co. v. Jensen, 244 U. S. 205, to Northern Coal & Dock Co. v. Strand (filed on December 10, 1928), which pass upon questions concerning injured workers, whose labor was to some degree associated with shipping, but who were not actual members of a ship's crew,—that is, whose activities were not of a nature to make them constantly subject to maritime law; for, it seems to us, in such [fol. 38] opinions must be found the principles that control the present case. We shall mention all and discuss most of them during the course of this opinion,

While, possibly, some of the authorities which we intend to consider are not strictly within either of the classes about to be named, the cases, speaking broadly, fall into two general groups: (1) those involving injuries to stevedores and others whose occupation directly depended on navigation or commerce (this group we shall call "stevedore cases"), and (2) those involving injuries to workers, such as mechanics, whose occupation did not necessarily depend on navigation or commerce, but who, when injured, were making repairs to ships in navigable waters (this group we shall call "repair cases"). The latter class will be taken up first.

In Great Lakes Dredge & Dock Co. v. Kierejewski, 261 U. S. 479, the injured man having died, the question was, could there be a recovery under the maritime law, as supplemented by a local statute giving a right to recover in death cases, when that right did not exist in admiralty? Claimant's husband, a boilermaker, was killed while repairing a scow in navigable waters, through the negligence of the Dredge & Dock Co., his employer. His widow recovered damages in a district court, judgment was entered in her favor, and the employer appealed to the United States Supreme Court. In affirming, the Supreme Court said that Kierejewski was killed "while performing maritime service to a completed vessel afloat * * * upon navigable waters, as the result of a tort there committed"; and that "the rules of the maritime law, supplemented by the local death statute, applied and fixed the legal rights and liabilities of the parties." Thus, the local law was allowed application to the extent indicated.

The next case, Gonzales v. Morse Dry Dock & Repair [fol. 39] Co., 266 U. S. 171, also came to the Supreme Court on appeal from a judgment of a federal district court, entered in an admiralty proceeding. Gonsalves, while working for the defendant dock company, making repairs on board a ship in a floating dock on navigable waters, was injured "through the explosion of a blau torch" which the employer negligently permitted to be out of repair. The court below, apparently viewing the facts as presenting a land case, refused relief on the ground that it had no jurisdiction. The Supreme Court reversed, holding that "repairs to a vessel while in ordinary dry-dock were not made

on land"; that claimant's injury was sustained through a tort "committed and effective on navigable waters," and therefore admiralty had jurisdiction. So far as the report of the case shows, there was no question of the work which Gonsalves was doing at the time of his injury bearing direct relation to navigation, or, as here, of the maritime law being affected by a local workmen's compensation act.

Robins Dry Dock & Repair Co. v. Dahl, 266 U. S. 449, came to the Supreme Court of the United States on appeal from a judgment of a state court of New York, entered in a common-law action to recover damages for personal injuries, received by Dahl in the course of his employment with the Dry Dock Co., caused by the breaking down of " a plank scaffold on which he was * * * standing," while engaged in "repair work" on a steamer, belonging to his employer, "lying in navigable waters." The complaint was that his employer failed to furnish him with a safe place to work. A judgment in favor of the injured man was reversed because the jury had been instructed that, in deciding whether the employer was negligent, it might consider the provisions of a local statute regulating the construction of scaffolds. The Supreme Court said (p. 457): "The alleged tort was maritime, suffered by one doing repair work on board a completed vessel [in navigable [fol. 40] waters.] The matter was not of mere local concern * * * but had direct relation to navigation and commerce * * *. The rights and liabilities of the parties arose out of and depended upon the general maritime law and could not be enlarged or impaired by the state statute."

In the last of the four repair cases, Messel v. Foundation Company, 274 U. S. 427, plaintiff sued in a state court of Louisiana to recover damages for personal injuries suffered while in the employ of defendant company, which was engaged in shipbuilding and ship-repairing. At the time of the accident, claimant was engaged in the work of adding to the height of a smokestack on board one of defendant's ships, when steam, negligently allowed to escape, seriously injurd him. Messel claimed to recover under a certain article of the civil code of Louisiana, and also as an alternative, under the workmen's compensation act of that State, if it could constitutionally apply. The state court held that

neither of these remedies was available to plaintiff. On appeal, the Supreme Court of the United States reversed and held that, though, on the facts involved, the workmen's compensation law of Louisiana could have no application, yet claimant might sue under the state civil code, and that such suit would be governed by principles applicable to the admiralty law, written and unwritten, of the United States; in short, that, under the circumstances, the admiralty law of the United States might be enforced by a civil suit in the courts of Louisiana.

The general nature of the case at bar brings it within the repair group but, as we proceed, it will be seen that this case differs, in certain more or less material particulars, from those previously decided by the United States Supreme Court.

For the present, it is enough to note that the record now before us does not show any contract of general employment between plaintiff and defendant Iron Works, nor suggest that Span was originally engaged on, in or about ships. Apparently he was a land man, under a land con- [fol. 41] tract of employment, who happened to be injured on a ship while doing work of a nature which had no direct relation to navigation or commerce; whereas, in each of the four cases just reviewed, the injured person was employed by a concern directly and apparently exclusively, engaged in maritime work, and the records there involved indicate or strongly suggest that his original employment contemplated work having some direct relation to navigation or commerce.

In one of the four cases above mentioned, and in some others to be mentioned, when determining whether the injured person's rights could be affected by a local statute, the terms of his contract of general employment were considered: see Southern Pacific Co. v. Jensen, 244 U. S. 205, 217; Grant Smith-Porter Co. v. Rohde, 257 U. S. 469, 475-6; Industrial Commission v. Nordenholt Co., 259 U. S. 263, 276; Great Lakes, etc., Co. v. Kierejewski, supra, 480; Alaska Packer's Assn. v. Industrial, etc., Commission, 276 U. S. 467; Northern, etc., Co. v. Strand (not yet reported). The terms of such a contract do not, however, control the question of whether work being done at a particular moment was of a maritime nature; on that point, the test is,

Was the employer against whom the claim for damages is made engaged in a maritime undertaking at the time of the injury? If he was thus engaged, so was the injured employe (Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 61-2; though that fact, we think the federal authorities indicate, does not of itself bar the latter from claiming the benefits of a local law.

The four decisions of the Supreme Court of the United States discussed above, and other federal cases, denote that repairing a completed vessel lying in navigable waters may be accounted part of the maintenance of the boat and hence a maritime act (see also Trainer v. The Boat Superior, 1 Gilpin's Reports, 514, 516); but the mere fact that, at the moment of his injury, one was engaged in performing [fol. 42] services which might properly be classed as "maritime in character" is not the final test as to exclusiveness of maritime jurisdiction to adjudge rights growing out of the situation; Sultan Ry. etc., Co. v. Dept. of Labor, 72 L. Ed. 559, 560. We shall show, later on (after first explaining our understanding of what we have called the Stevedore Cases, supra), that recent opinions written by the United States Supreme Court lay down additional tests. These are: (1) Had the injured person's activities at the time of the accident "direct relation to navigation or commerce"? (2) Under the circumstances of the particular case, would "the regulation of the rights, obligations and consequent liabilities of the parties, as between themselves, by a local rule, * * * necessarily work material prejudice to any characteristic feature of the general maritime law or interfere with [its] proper harmony or uniformity"? As we understand the relevant opinions, if a reasonable view of the facts involved in any particular case warrants a negative answer to the above questions, admiralty will yield to local law, even though such law be evidenced by a workmen's compensation statute.

In reading the cases of injuries to stevedores, longshoremen, and others doing approximately like work, it must be constantly remembered that men following such occupations are looked upon by the federal authorities as largely entitled to the protection afforded seamen (Atlantic Trans-

port Co. v. Imbrovek, 234 U. S. 52, 62; International Stevedoring Co. v. Haverty, 272 U. S. 50, 52), attached to the boat on which they labor, and, therefore, when they work on a ship in navigable waters, their labor is accounted as bearing direct relation to navigation and commerce. As previously noted, the decisions in such cases may be classed by themselves; they do not govern a controversy like the one now before us, involving injury to a mechanic (not a seaman, nor otherwise directly connected with navigation) employed by a third party (who, so far as the record shows, was not the owner or operator of the ship on which the [fol. 43] accident occurred, nor generally engaged in a business dependant upon maritime work), where plaintiff was injured, while painting an interior room of a vessel on navigable waters, by sparks flying from an acetylene torch in the hands of another employe of the third party (the latter employe also, so far as the record shows, not being a seaman nor otherwise directly connected with navigation).

While none of the decisions already mentioned, nor any of those we are about to discuss, rule the case before us, yet the opinions in many of them contain, as will be shown, enlightening judicial utterances, in which, we think, may be found the key to the present situation.

Southern Pacific Co. v. Jensen, 244 U. S. 205, was a stevedore case. It was there decided that one injured while following such a maritime occupation, upon a ship in navigable waters, was not entitled to the benefits of a state workmen's compensation act; that his remedy was exclusively in admiralty. This decision has been closely followed in all subsequent stevedore and like cases where the injury happened on board a ship in navigable waters. See Clyde S. S. Co. v. Walker, 244 U. S. 255, 257; Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 155, 157-9; Washington v. Dawson, 264 U. S. 219, 227-8; Northern Coal & Dock Co. v. Strand (not yet reported). On the other hand, where men working at such employments are injured on shore, even though they may be performing work in connection with the unloading of a ship, the local law applies rather than the maritime. See State Industrial Commission v. Nordenholt, 259 U. S. 263; Smith v. Taylor, 276 U. S. 179.

In State Industrial Commission v. Nordenholt, supra (a

longshoreman case where the injury happened on a dock, and the state compensation law was allowed to apply), the United States Supreme Court, in the course of its opinion, said (pp. 272-3), in a general way, that, "When an employe working on board a vessel in navigable waters, sustains [fol. 44] personal injuries and seeks damages from the employer, * * * the liability of the employer must be determined under the maritime law * * * The liability of the employer for damages on account of injuries received on shipboard by an employe under a maritime contract is matter within the admiralty jurisdiction." At first glance this judicial utterance may appear to mean that, whenever an employee of any kind, doing any sort of work on board a vessel in navigable waters, sustains injuries, the employer's liability will be determined under maritime law; but the last part of the quotation and the rule that everything said in an opinion must be read in the light of the facts in the case, show, we think, the court's meaning to be that, whereever an employe, working at a maritime pursuit, or, in the words of the opinion, under a "maritime contract"—that is, at some work which has direct relation to navigation and commerce—suffers an injury on shipboard, the maritime law applies; not that whenever any employe, doing any kind of work under any sort of a contract, is injured on shipboard the maritime law must apply, simply because the injury occurred there.

Again, in Smith v. Taylor, 276 U. S. 179, another stevedore case where the injury occurred on a wharf—an extension of the land—the Supreme Court, in the course of its opinion states: "If the cause of action arose upon the river [a navigable stream], the rights of the parties are controlled by maritime law." Here again the passage in question must be read in connection with the facts of the particular case; and, when so read, it does not mean that every cause of action which arises upon navigable water is controlled by maritime law. Though it does seem to mean that injuries happening on land, even where the injured stevedore is engaged in what might be accounted maritime work, under a maritime contract, may be accounted local [fol. 45] and subject to the land law rather than maritime law.

As previously noted, there is a doctrine, announced in recent opinions of the United States Supreme Court, to this effect: That "state statutes providing compensation" for injured employees may "be treated as amending or modifying the maritime law in cases where they concern purely local matters and occasion no interference with the uniformity of such law in its international and interstate relations": Northern Coal & Dock Co. v. Strand, supra, and authorities there cited. In Alaska Packers' Assn. v. Industrial Commission, 276 U. S. 467, the Supreme Court said that, "Whether in any possible view the circumstances disclose a cause within the admiralty jurisdiction," was not the question for determination. Equally, in a case like the present it is not necessary to determine whether admiralty could have jurisdiction, but only whether or not the Pennsylvania act can apply notwithstanding general admiralty jurisdiction; or, in other words, whether plaintiff, when injured, was "engaged in any work so directly connected with navigation and commerce that to permit the rights of the parties to be controlled by local law would interfere with the essential uniformity of the general maritime law": Alaska Case, supra. The point, however, is to find some logical method of classifying cases so as to determine which of them "concern purely local matters and occasion no interference with the uniformity of maritime law," and which, on the other hand, concern more than purely local matters.

In Chelentis v. Luckenback S. S. Co., 247 U. S. 372, a fireman, injured on board a ship at sea, instituted a common law action in a state court to recover "full indemnity for damages sustained." The case was removed to a United States district court because of diverse citizenship. It was there decided that no such recovery could be had, and in affirming, on appeal, the United States Supreme Court said (p. 382):

"Under the doctrine approved in Southern Pacific Co. v. [fol. 46] Jensen, no state has power to abolish the well recognized maritime rule concerning the measure of recovery and substitute therefor the full indemnity rule of the common law. Such a substitution would distinctly and definitely change or add to the settled maritime law and would

be destructive of the uniformity and consistency at which the Constitution aimed."

The case mentioned at the head of the immediately preceding paragraph and others following immediately hereafter are inserted at this stage of the opinion because they contain expressed views showing when the application of a state law will be allowed in the field of admiraty, as not occasioning any undue interference with the uniformity of the maritime law, and when it will not; but in reading the Chelentis Case it must be remembered that, unlike the one at bar, it is not one of those dealing with an injury to a laborer on shipboard, who was unconnected with the boat in any permanent sense and who, at the time of his injury, was engaged in work only remotely relating to navigation or commerce; there the claimant was attached to the boat on which he was hurt, his contract or empoyment was strictly maritime, and he was injured when performing services of a nature relating directly to navigation; so, under all the authorities, he was confined to admiralty relief.

In Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, Stewart, who was employed as a bargeman and "doing work of a [strict] maritime nature," fell into the Hudson River and was drowned. His widow received an award under the local workmen's compensation law, which award was approved by the state courts, on the theory that a recently passed Act of Congress, "to save to claimants the rights and remedies under the workmen's compensation law of any state," had in effect overruled the Jensen Case. The United States Supreme Court reversed, remanding the record for further proceedings not inconsistent with its opinion. It [fol. 47] held the act in question to be unconstitutional, saying, at page 163, that Congress undertook to permit application generally of "workmen's compensation laws of the several states to injuries within the admiralty * * * jurisdiction, and to save such statutes from the objections pointed out by Southern Pacific Co. v. Jensen"; that this was beyond their power under the Constitution, adding at page 164, "To say that, because Congress could have enacted a compensation act applicable to maritime injuries, it could authorize the states to do so as they might desire,

is false reasoning. Such an authorization would inevitably destroy the harmony and uniformity which the Constitution not only contemplated but actually established. * * * Congress cannot transfer its legislative power to the States."

Western Fuel Co. v. Garcia, 257 U. S. 233, came to the Supreme Court of the United States from a federal circuit court. The case involved a claim for the death of a stevedore killed while doing maritime work in San Francisco Bay. The Supreme Court said: "Where death * * * results from a maritime tort committed on navigable waters within a state whose statutes give a right of action on account of death by wrongful act [the general maritime law giving no such right], the admiralty courts will entertain a libel in personam for the damages sustained by those to whom such right is given. The subject is maritime *and local* in character [the italics are ours], and the specified modification of, or supplement to, the rule applied in admiralty courts, when following the common law, will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law." Here, even in a stevedore case, the local law was allowed application to the extent indicated.

In Grant Smith-Porter Co. v. Rohde, 257 U. S. 469, appealed from a federal circuit court, claimant was injured [fol. 48] while working as a carpenter, constructing a bulkhead enclosing tanks on a ship docked in navigable waters. He was employed by a shipbuilding company engaged in constructing steam vessels for the United States government. The vessel on which he was working when hurt had been launched; and, though the Supreme Court states in an early part of its opinion that the boat was "substantially completed," yet, later, it treats it as "an incompleted structure." The State of Oregon, where the accident happened, had a workmen's compensation law to which, generally speaking, the employer and employe in this case were subject. The questions submitted to the Supreme Court of the United States for decision were (p. 475):

"1. Is there jurisdiction in admiralty because the alleged tort occurred on navigable waters?

2. Is libellant entitled because of his injury to proceed in admiralty against respondent for the damages suffered?"

The thought in mind evidently was that if such jurisdiction existed, it would be exclusive. While answering the above questions in the affirmative, the court held that, since the ship involved was an incompleted structure (under the federal law, contracts for constructing ships, even though seagoing, are accounted nonmaritime: People v. Beers, 61 U. S. 393, 402; Roach v. Chapman, 63 U. S. 129, 132; Thames v. The Schooner Francis McDonald, 254 U. S. 242, 243), "neither Rohde's general employment nor his activities at the time of the accident had any direct relation to navigation or commerce," and that (p. 476), "under such circumstances, regulation of the rights, obligations and consequent liabilities of the parties, as between themselves, by a local rule, would not necessarily work material prejudice to any characteristic feature of the general maritime law or interfere with the proper harmony and uniformity of that law." Again, at page 477, the Court said: "Here, the parties contracted with reference to the state statute; their rights and liabilities had no direct relation to navigation, and the application of the local law cannot materially [fol. 49] affect any rules of the sea whose uniformity is essential." The specific answer, "Yes," given to each of the queries placed before the court, must be taken, with the above as meaning that, although "the general admiralty jurisdiction" might under some circumstances extend to a proceeding to recover damages arising from a tort "committed on a vessel in process of construction when lying on navigable waters within a state" (pp. 477-8), yet where, in such a case, the state in question has a local law reaching the particular facts, if these facts and the local law are of such a nature that to permit the latter to apply would in no wise materially affect any rules of the sea whose uniformity is essential to be maintained, the law in question will be allowed to apply, notwithstanding general admiralty jurisdiction. We think, from this Rohde Case and subsequent opinions mentioning it, the view may be fairly deduced that, in a case like the present, where neither the injured person's general employment nor his particular

activities at the time of the accident bear any direct relation to navigation or commerce, a state workmen's compensation law may apply.

Mr. Justice McReynolds, who wrote the opinion in the Rohde Case, subsequently explained its meaning, in Great Lakes Dredge, etc. v. Kierejewski, 261 U. S. 479, 480-1, thus:

"Neither Rohde's general employment nor his activities had any direct relation to navigation or commerce—the matter was purely local—and we were of opinion that application of the state statute, as between the parties, would not work material prejudice to any characteristic feature of the general maritime law or interfere with its proper harmony or uniformity."

Again, in Washington v. Dawson, 264 U. S. 219, 226, he said:

"Grant Smith-Porter Ship Co. v. Rohde was a proceeding in admiralty to recover damages from the ship-builder for injuries which the carpenter received while working on an unfinished vessel moored in the Willamette River at [fol. 50] Portland, Oregon. * * * 'Neither Rohde's general employment nor his activities at the time had any direct relation to navigation or commerce.' We held the matter was only of local concern and that to permit the rights and liabilities of the parties to be determined by the local law would not interfere with characteristic features of the general maritime rules."

Finally, in Miller's indemnity Underwriters v. Brand, 270 U. S. 59, 64, the same Justice said:

"We * * * held [in the Rohde Case] that, under the circumstances disclosed, 'regulation of the rights, obligations and consequent liabilities of the parties, as between themselves, by a local rule, would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law.'"

At another point he said that "the parties [in the Rohde Case] were clearly and consciously within the terms of the

statute [workmen's compensation law of the state] and did not in fact suppose they were contracting with reference to the general system of maritime law."

Miller's Indemnity Underwriters v. Barud, last referred to, Northern Coal & Dock Co. v. Strand, supra, Sultan Ry. v. Dept. of Labor, supra, and Alaska Packer's Assn. v. Industrial Commission, supra, are the most recent cases to give an indication of what is meant by the expression "purely local."

In the Strand Case, the Supreme Court said, as shedding light on the meaning of the phrase in question: "The unloading of a ship is not a matter of purely local concern; it has direct relation to commerce and navigation." We may here remark that, while the kind of work plaintiff in the present case was doing at the time of his injury might be said to have a certain remote relation to navigation and commerce, yet it seems to us that such work cannot be held to bear any "direct" relation to those subjects.

In Underwriters v. Braud, first of the recent cases above [fol. 51] mentioned, a diver employed by a shipbuilding company was killed while submerged in a navigable river, "sawing off timbers of an abandoned set of ways once used for launching ships, which had become an obstruction to navigation." He was awarded damages under a state workmen's compensation law, and in due course this award was affirmed by the Supreme Court of the United States. Mr. Justice McReynolds there said (p. 64):

"In the cause now under consideration, the record discloses facts sufficient to show a maritime tort to which the general admiralty jurisdiction would extend save for the provisions of the state compensation act; but the matter is of mere local concern and its regulation by the state will work no material prejudice to any characteristic feature of the general maritime law."

This can be as well said of the present case, where not even a tort is shown, merely an accidental injury of a character which might have occurred anywhere but which by chance happened on a boat in navigable waters.

In Sultan Ry., etc. v. Department of Labor, appealed from a state court (the third of the recent cases referred to above), the application of a local workmen's compensation law was resisted on the ground that the workers affected—loggers employed by timber and mill companies,—fell under the exclusive jurisdiction of admiralty because their labors carried them upon a navigable stream. In deciding that the local act could apply, the United States Supreme Court said:

"It is settled by our decisions that where the employment, *although maritime in character*, pertains to local matters, *having only an incidental relation to navigation and commerce*, the rights, obligations and liabilities of the parties, as between themselves, may be regulated by local rules which do not work material prejudice to the characteristic features of the general maritime law or interfere with its uniformity."

The above italics are ours. The original contracts of land [fol. 52] employment and the incidental going upon navigable waters in the Sulton Case and in the one now before us seem analogous. As of the loggers in the former, so it may be said of the present plaintiff; that the labor of a maritime character at which he was engaged at the time of his injury had "only incidental relation to navigation and commerce," and since his contract of general employment is not shown to be other than a land contract, the mere incident that its performance carried plaintiff temporarily on navigable waters, was not sufficient to cause that employment, and the rights and liabilities which pertain to it, to be so deprived of their essentially local character that admiralty would take jurisdiction to the exclusion of a helpful state law.

In Alaska P. Assn. v. Industrial Commission (the fourth of the recent cases above mentioned), claimant, originally employed to do both land and sea work, was injured while endeavoring to push a stranded boat into a navigable river; an award under a state compensation act was sustained by the United States Supreme Court, Mr. Justice McReynolds saying, inter alia:

"When injured, certainly he [the claimant] was not engaged in any work so directly connected with navigation

and commerce that to permit the rights of the parties to be controlled by the local law would interfere with the essential uniformity of the general maritime law. The work was really local in character." (Citing there the Rohde and Braud cases.)

It is difficult to deduce and state any general rule by which to judge whether a particular set of facts constitute a "purely local" situation, within the meaning of the federal authorities, to which a local act may apply, or a situation governed exclusively by the maritime law; but, after studying the relevant authorities, it seems to us that in each case the determining questions are:

(1) Did the injured person's activities at the time of the [fol. 53] accident have a direct relation to navigation or commerce?

(2) Were his activities of such a nature that the application of a particular local law, as between the parties, would work material prejudice to some characteristic feature of the general maritime law or interfere with its proper harmony or uniformity? Great Lakes Dredge & Dock Co. v. Kierejewski, 261 U. S. 479, 480-1.

In the present case, plaintiff was a mechanic; not a seaman in any proper sense of that term. So far as the record shows, he had no general maritime employment; he happened to be sent by his employer (a third party engaged by the ship owner) to do some painting in the engine room of a vessel laid up for repairs in navigable waters, and was injured while thus engaged, not by any act on the part of either the ship owner or its employes, nor because of any motion of the boat or other matter peculiar to navigation or commerce, but by pure accident, contributed to by one who, like himself, was working for the contractor engaged by the ship owner. This contractor, third-party employer, and the plaintiff had agreed between themselves that, in case of injury to the latter during the course of his employment, he would be entitled to compensation according to a schedule in the state compensation act. Here, as much as in the Rohde Case, we think it can be said, "the parties, plaintiff and defendant, contracted with reference to the state statute" and "the ap-

plication of the local law" to "their rights and liabilities" "cannot materially affect any rules of the sea whose uniformity is essential." Furthermore, if a state statute allowing recovery in cases of death due to a maritime tort,—a recovery which was not permitted in admiralty—can be allowed application in a stevedore case, as not interfering with the proper harmony and uniformity of the maritime law (Western Fuel Co. v. Garcia, supra), surely a state statute—giving rise to an implied agreement for compensation to a mechanic (whose general employment, so far as the record shows, was not maritime) accidentally injured during the course of his work, which, at the time of the injury, happened to be on a boat in navigable waters—[fol. 54] can be permitted application to the facts in this case, without undue interference with the uniformity of the federal law: see Great Lakes D. & D. Co. v. Kierejewski, supra. As we view it, there is nothing in the situation here presented which will cause material prejudice to any characteristic feature of the general maritime law or interfere with its proper harmony or uniformity if the rights of the parties, between themselves, are adjudged according to the local statute; therefore, we hold that the Pennsylvania Workmen's Compensation Act was properly applied.

In the cases which we have discussed, where admiralty took jurisdiction to the exclusion of the local law, the injury occurred while the person in question was engaged in activities which had a much plainer and more direct relation to navigation than the work of the present claimant. Moreover, in each of those cases the injuries resulted from a maritime tort—that is, a wrongful act committed on the high seas or on navigable waters: Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 59, 60. While the jurisdiction of the federal courts "comprehends all maritime contracts, torts and injuries" (see Campbell v. Hackfeld, 125 Federal Reporter 696, 697, 700 citing and quoting from Judge Story, in DeLovio v. Boit, 2 Gall. 398, 474, Fed. Cas. No. 3, 776), yet in all the federal cases where admiralty relief was afforded to physically injured persons who were not members of the crew of or constantly attached to the ship on which they were hurt, the injuries were attributable to a maritime tort—a fact emphasized in each instance: see, for example, Atlantic Transport Co. v. Imbrovek, 234 U. S. 52,

58 et seq.; Great Lakes v. Kierejewski, 261 U. S. 479, 481; Gonsalves v. Morse, 266 U. S. 171, 172; Northern, etc., Co. v. Strand, not yet reported. Here, as previously stated, no tort was committed; so far as the record indicates, the injury to plaintiff was purely accidental. Under these cir-
[fol. 55] cumstances, since plaintiff cannot in any proper sense be classed as a seaman, entitled in admiralty to a measure of relief for accidental injuries (see The Osceola, 189 U. S. 158), to refuse application of the local compensation law would in effect deprive him of all relief.

We may add, in conclusion, that, since the opinion of the Superior Court in this case—accompanying the final judgment appealed from—was written, the Supreme Court of the United States, in Northern Coal & Dock Co. v. Strand, supra, has definitely held, as we understand the majority view there expressed, that the states have no power, on the ground of implied contract, voluntary election, or any other theory, to put upon an employer, "in respect of men engaged to perform work * * * on shipboard," when their labor bears direct relation to navigation or commerce, obligations of the kind imposed by the workmen's compensation acts; and, in our opinion, the insurance carrier can be held to only such liabilities as may be imposed on the employer. When, as here, however, the labor in question is not shown to bear any direct relation to navigation or commerce, a different situation is presented; and that is the key to the solution of this case.

The judgment is affirmed.

[File endorsement omitted.]

[fol. 56] In Supreme Court of Pennsylvania

[Title omitted]

Petition for Appeal, Assignment of Errors, and Prayer for Reversal—Filed March 5, 1929

Petition for Appeal

To the Honorable the Chief Justice of the Supreme Court of Pennyslvania:

John Baizley Iron Works and The Ocean Accident and Guarantee Corporation, Limited, appellants, considering

themselves aggrieved by the final decision of the Supreme Court of the State of Pennsylvania in the above entitled cause hereby pray that an appeal be granted therefrom, and for an order fixing the amount of the bond thereon, and in support thereof respectfully represent:

1. The statute of the State of Pennsylvania, the validity of which is drawn in question is the Workmen's Compen-
[fol. 57] sation Act of June 2, 1915, P. L. 736, as amended by the Act of June 26, 1919, P. L. 642.

2. The said Pennsylvania statute, as construed by the Supreme Court of Pennsylvania is repugnant to the following provisions of the Constitution of the United States, viz: Article I, Section 8, Clause 3; and Article III, Section 2, Clause 1.

It is also repugnant to the following laws of the United States, viz: Revised Statutes, Sections 563 and 711 (Judicial Code Sections 24 and 256 respectively).

3. Appellants clearly raised this constitutional question in their appeals from the award of the Referee, the order of the Workmen's Compensation Board affirming said award, the judgment of the Court of Common Pleas No. 4 of Philadelphia County, and the judgment of the Superior Court of Pennsylvania. The said constitutional question was the only issue involved in each and all of the said appeals. The Supreme Court of Pennsylvania in its opinion filed January 7, 1929, held that the said Pennsylvania statute, as construed by said Supreme Court to be applicable to regulate the rights and remedies of an employee injured while repairing a vessel lying in navigable waters, did not violate the aforementioned provisions of the Constitution and laws of the United States.

4. This case is reviewable by the Supreme Court of the United States on appeal under Section 237 of the Judicial Code (U. S. Compiled Statutes 1923, Section 1214) because there were clearly drawn into question, from the beginning of the litigation the validity of the said Workmen's Compensation Act of Pennsylvania above referred to on the ground that, as construed by the various tribunals before
[fol. 58] whom the issue was raised, was repugnant to the sections of the Constitution and laws of the United States

above referred to, and the final decision of the Supreme Court of Pennsylvania was in favor of its validity.

5. Attached hereto is the opinion of the Supreme Court of Pennsylvania filed by Mr. Chief Justice von Moschzisker, together with a motion for re-argument as required by the rules of the Supreme Court of Pennsylvania.

Assignments of Error

And the said John Baizley Iron Works and Ocean Accident and Guarantee Corporation, Limited, appellants, assign the following errors in the record and proceedings in the said case.

1. The Supreme Court of the State of Pennsylvánia erred in holding that the claimant, Abraham Span, was entitled to compensation under the Pennsylvania Workmen's Compensation Act.

2. The Supreme Court of Pennsylvania erred in failing to sustain the appellants' contention that the said claimant's cause of action, if any, was subject solely to admiralty and maritime law and not to the Compensation Law of Pennsylvania.

3. The Supreme Court of Pennsylvania erred in holding: "* * * while the kind of work plaintiff in the present case was doing at the time of his injury might be said to have a certain remote relation to navigation and commerce, yet it seems to us that such work cannot be held to bear any direct relation to those subjects."

4. The Supreme Court of Pennsylvania erred in holding: "* * * since his contract of general employment is not [fol. 59] shown to be other than a land contract, the mere incident that its performance carried plaintiff temporarily upon navigable waters was not sufficient to cause that employment, and the rights and liabilities which pertain to it, to be so deprived of their essentially local character that admiralty would take jurisdiction to the exclusion of a helpful state law."

5. The Supreme Court of Pennsylvania erred in holding: "As we view it, there is nothing in the situation here presented which will cause material prejudice to any charac-

teristic feature of the general maritime law or interfere with its proper harmony or uniformity if the rights of the parties, between themselves, are adjudged according to the local statute; therefore, we hold that the Pennsylvania Workmen's Compensation Act was properly applied."

6. The Supreme Court of Pennsylvania erred in entering the following order affirming the judgment of the Superior Court of Pennsylvania:

The judgment is affirmed."

PRAYER FOR REVERSAL

For which errors the appellants, John Baizley Iron Works and Ocean Accident and Guarantee Corporation, Limited, pray that the said judgment of the Supreme Court of the State of Pennsylvania dated January 7, 1929, in the above entitled cause, be reversed and a judgment be rendered in favor of the said appellants, and for costs.

Chas. A. Wolfe, Owen J. Roberts & Montgomery,
Counsel for Petitioners.

Duly sworn to by Chas. A. Wolfe. Jurat omitted in printing.

[fols. 60-82] [File endorsement omitted.]

[fols. 83 & 84] Bond on appeal for $500.00 approved and filed March 7, 1929, omitted in printing.

[fol. 85] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

STIPULATION AND PRÆCIPE FOR TRANSCRIPT OF RECORD—
Filed March 15, 1929

To the Prothonotary of the Supreme Court of Pennsylvania:

And now, to wit: this 15th day of March 1929, Appellants and Appellee, by their respective counsel stipulate that the

transcript of the Record on appeal to the U. S. Supreme Court in the above entitled cause, shall consist of the following portions of the Record, and request you to prepare said transcript and include therein, in the order given below, the following:

1. Order allowing appeal and fixing amount of bond.
2. Citation and affidavit of service thereof.
3. Claim petition filed for compensation.
4. Record before Workmen's Compensation Board:

A. Testimony:

(a) Direct examination of claimant (pp. 11a-16a of Record in Superior Court.)

(b) Cross-examination of claimant (p. 17a of Record in Superior Court.)

B. Opinion of the Referee.

C. Opinion of the Workmen's Compensation Board.

5. Opinion of the Court of Common Pleas, Finletter, J.
6. Opinion of Superior Court of Pennsylvania, Linn, J.

[fol. 86] 7. Agreed statement of facts.

8. Opinion of Supreme Court of Pennsylvania, Moschzisker, C. J.
9. Petition for Appeal, Assignments of Error and Prayer for Reversal.
10. Supersedeas Bond.
11. Stipulation and Præcipe for Transcript of Record.

Chas. A. Wolfe, Owen J. Roberts, of Counsel for Appellants. Samuel Moyerman, Counsel for Appellee.

[File endorsement omitted.]

[fol. 87] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 88] Judge's certificate to Clerk omitted in printing.

Clerk's certificate to Judge omitted in printing.

[fol. 89] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF THE POINTS TO BE RELIED UPON AND STIPULATION IN LIEU OF DESIGNATION AND COUNTER DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed Apr. 4, 1929.

Come now the appellants and adopt their assignments of error as their statement of the points to be relied upon.

Owen J. Roberts, Counsel for Appellants. Charles A. Wolfe, Roberts & Montgomery, of Counsel for Appellants.

And now, to wit, April 2nd, 1929, it is stipulated and agreed by and between Owen J. Roberts, Esq., counsel for Appellants, and Samuel Moyerman, Eeq., counsel for Appellee, that the whole of the record, as filed, except the [fols. 90 & 91] exhibits attached to the petition for appeal, which are contained on pages 61 to 82, inclusive, of the Record, is necessary for the consideration of the above case.

Owen J. Roberts, Counsel for Appellant. Charles A. Wolfe, Roberts & Montgomery, of Counsel for Appellants. Samuel Moyerman, Counsel for Appellee.

[fol. 92] [File endorsement omitted.]

Endorsed on cover: File No. 34,119. Pennsylvania Supreme Court. Term No. 810. John Baizley Iron Works and The Ocean Accident and Guarantee Corporation, Limited, appellants, vs. Abraham Span. Filed April 4th, 1929. File No. 34,119.